Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

TOM SWINT, et al.,

Petitioners,

v.

CHAMBERS COUNTY COMMISSION, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the sheriff of a county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. Section 1983.

II. Whether the decision below by the 11th Circuit Court of Appeals denying Defendant's First Motion for Summary Judgment is the law of the case.

PARTIES

The parties in the Court below are as follows:

Plaintiffs-Appellants: Tom Swint, Tony Spradley, Drecilla James, and Jerome Lewis.

Defendants-Appellees: Chambers County Commission and James C. Morgan.

The Plaintiffs-Appellants are petitioners in this Court.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, who are citizens of Alabama and Georgia and Plaintiffs in the District Court, request that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit to review that court's decision holding that sheriffs in Alabama are not final county policymakers in matters of law enforcement for purposes of county liability under 42 U.S. Section 1983.

OPINIONS BELOW

The December 27, 1996 opinion of the Eleventh Circuit is unreported.

No. 96-6229 (11th Cir. 1997), and is reproduced in the appendix to this petition, p. App. 1. The January 29, 1996 decisions of the United States District Court for the Middle District of Alabama is unreported and reproduced in the appendix, p. App. 8.

JURISDICTION

The opinion of the Eleventh Circuit was issued on December 27, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The federal statute involved is 42 U.S.C. Section 1983. Article V, Section 138 of the Alabama Constitution is

relevant, as are various provisions of the Alabama code, including Sections 36-22-2, 36-22-3, 36-22-5, 36-22-6, 36-22-13, 36-22-16, 36-22-17, 36-22-18, 36-22-19, 36-22-42, 11-1-11, and 11-2-30.

STATEMENT OF THE CASE

This police misconduct case was filed against governmental bodies and law enforcement officials from Chambers County, Alabama, and the City of Wadley, Alabama. After the District Court issued orders granting in part and denying in part various motions to dismiss, the Defendants appealed. The Eleventh Circuit Court of Appeals affirmed the denial of summary judgment with respect to the Fourth Amendment and equal protection claims against Defendant Sheriff James C. Morgan. The Court granted summary judgment to the Chambers County Commission on the ground that sheriffs in Alabama are not final county policymakers in the area of law enforcement. *Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir. 1993). On Sheriff Morgan's request for rehearing, the Court reconsidered and reversed the denial of summary judgment on the equal protection claim, but continued to hold that Sheriff Morgan is required to stand trial on the Fourth Amendment claim. *Swint v. City of Wadley*, 11 F.3d 1030 (11th Cir. 1994).

At the Plaintiff's request, the United States Supreme Court granted certiorari on the county liability issue and the case was argued. The Court vacated the Court of Appeals decision on that particular question, holding that

the Court of Appeals did not have jurisdiction to entertain an interlocutory appeal from the County without certification. *Swint v. Chambers County Commission,* 115 S.Ct. 1203 (1995).

On remand, the Court of Appeals conformed its opinion to the Supreme Court's decision and remanded to the District Court for further proceedings. *Swint v. City of Wadley,* 51 F.3d 988, 999 (11th Cir. 1995). Upon remand to the District Court, a settlement was reached with a number of Defendants and the only two Defendants remaining were Sheriff Morgan and the Chambers County Commission.

The District Court ordered the parties to file statements regarding the issues remaining in the case. On or about October 30, 1995, the Defendants Chambers County Commission and Sheriff Morgan filed a joint "Response And Objection To Plaintiffs' Statement Regarding Pending Claims." In that document, Chambers County stated that it "respectfully requests the opportunity to resubmit a Motion for Summary Judgment for Chambers County based on the reasoning in *Swint v. City of Wadley* and the Eleventh Circuit's recent affirmance, in an unpublished opinion, of an Alabama District Court's holding that deputy sheriffs are not policymakers for Jefferson County. . . ." The County also contended in that joint response that an intervening Supreme Court decision required dismissal of the substantive due process claim against the County. However, nowhere in the response did Sheriff Morgan contend that intervening events or case law require the District Court to reverse itself – or the reverse the Eleventh Circuit – on whether the Fourth Amendment case against him should go to trial.

After the County requested the opportunity to file a summary judgment motion, the District Court issued a November 1, 1995, order permitting the filing of summary judgment motions by December 1, 1995. The County did file such a motion. However, Sheriff Morgan also filed his own summary judgment motion despite his concession that the Court already held that there was sufficient evidence against him to require a trial. With the motion, Sheriff Morgan attached three items: (1) a new affidavit from him, signed December 1, 1995, (2) a June 15, 1992 affidavit from Investigator Timothy Birchfield that already had been presented in conjunction with the first summary judgment motion, and (3) one page from the deposition of Plaintiff Dercilla James. None of this contained new evidence.

The District Court granted Sheriff Morgan's renewed summary judgment motion. It did so on the basis of statements in Morgan's new affidavit to the effect that it was not his policy that non-suspects could be searched or that business premises could be searched absent probable cause, and that he had not been told about improper practices at the first raid before the second one occurred. It also granted the motion for summary judgment of the Chambers County Commission, holding that counties in Alabama are not liable for the actions of their sheriffs in the area of law enforcement.

On appeal, the Eleventh Circuit agreed and affirmed, holding that summary judgments should be granted in the County Commission's favor. In its December 27, 1996 opinion, the Eleventh Circuit citing *McMillian v. Johnson*, 88 F.3d 1573 (11th Cir. 1996), noted that, under Alabama law, a sheriff is not a final policymaker in the area of law

enforcement. Pet. App. 4. The court also pointed out that because Morgan is an Alabama Sheriff and because the raids of Club Capri were law enforcement activities, Chambers County is not liable for any of Morgan's acts or decisions arising out of the raids.

In affirming the grant of Morgan's second motion for summary judgment, the Eleventh Circuit noted that the District Court grant of Morgan's Motion for Summary Judgment was appropriate because Morgan's affidavit was new and substantially different evidence within the first exception of the law of the case doctrine. Pet. App. 6. This petition follows. It seeks review of the Eleventh Circuit's decision regarding county liability and the liability of Sheriff Morgan.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE SAME QUESTION UPON WHICH THIS COURT GRANTED CERTIORARI IN McMILLIAN V. MONROE COUNTY, NO. 96-542.

On March 18, 1997, certiorari was granted in *McMillian v. Monroe County*, No. 96-542. Oral Argument was held on March 18, 1997. The issue presently before the Court in *McMillian* whether the sheriff of a county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. Section 1983. If the Court reverses the Eleventh Circuit in *McMillian*, it also must reverse the present case on the issue of County liability.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN PEMBAUR V. CINCINNATI.

In *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), this Court held that local governmental liability can be imposed under Section 1983 for the single action of a local governmental policymaker, if that person has final policymaking authority such that his or her "acts or edict may fairly be said to represent official policy." 475 U.S. at 480, quoting, *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). *Pembaur* involved a suit against several Defendants, including a County in Ohio, because of an unconstitutional entry and search of the Plaintiff's business. One of the alleged grounds for County liability was that the sheriff's unconstitutional actions were those of a final county policymaker. Justice Brennan's opinion in *Pembaur* made it clear that "decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to [local governmental] liability." 475 U.S. at 483, n. 12 (emphasis in original). *Pembaur*, this Court affirmed the conclusion of the Sixth Circuit Court of Appeals that the sheriff in that case could act as a final county policymaker with respect to law enforcement. 475 U.S. at 484.

The portion of the Sixth Circuit's opinion on the matter – explicitly affirmed in this respect by this Court – stated that, under Ohio law, the sheriff is elected by the resident of the County, serves as chief law enforcement officer of the County, receives his office, book, furniture, and other materials from the County, and receives his salary and training expenses from the county. Because of these factors, the Sixth Circuit held that the sheriff is the

final policymaker for the County with respect to the law enforcement activities at issue, *Pembaur v. Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984), and this Court affirmed on that point. 475 U.S. at 484.

Similarly, under Alabama law, the sheriff is elected by the residents of the County, serves as chief law enforcement officer for the County, receives his office, books, furniture, and other materials from the County, and receives his salary and expenses from the County. Ala. Const. Art. V, § 138; Ala. Code §§ 36-22-3, 36-22-5, 36-22-16, 36-22-18. There is nothing of relevance to distinguish the Alabama sheriff from the Ohio sheriff in *Pembaur*.

> While the Eleventh Circuit in the present case noted that sheriffs are considered state officials under Alabama law, the Eleventh Circuit also made it clear that this point was not dispositive. Instead, the Eleventh Circuit based its ruling on the fact that Alabama counties have no law enforcement authority independent of the sheriff. Pet. App 4. Neither this Court's opinion, nor the Sixth Circuit's opinion in *Pembaur* pointed to any independent law enforcement authority of Ohio counties or suggested the issue was relevant. It is not as if county governing boards in Ohio directly supervise the law enforcement activities of their sheriffs or ride around with the sheriffs in the patrol cars.

Therefore, on the relevant factors, there is little to distinguish Alabama from Ohio, and the decision below conflicts with this Court's decision in *Pembaur*.

III. BY GRANTING SUMMARY JUDGMENT FOR SHERIFF MORGAN AFTER RULING THAT SHERIFF MORGAN SHOULD GO TO TRIAL, THE ELEVENTH CIRCUIT COURT OF APPEALS CONTRAVENED THE DOCTRINE OF THE LAW OF THE CASE.

In *Swint v. City of Wadley, Ala.*, 5 F.3d 1435 (11th Cir. 1993) (*Swint I*) the Court of Appeals affirmed the Trial Court's decision denying Defendant Sheriff Morgan's motion for summary judgment. Because of its obvious relevance, that discussion is quoted at length:

> [T]here were two raids in this case during which allegedly unconstitutional conduct occurred. Sheriff Morgan bases his claim to qualified immunity on his lack of personal involvement in and his lack of knowledge as to the details regarding the conduct of both raids. Citing this Court's opinion in *Hardin v. Hayes*, 957 F.2d 845 (11th Cir. 1992), Sheriff Morgan urges us to focus on the information he possessed at the time he authorized the raids. We do so, but cannot ignore the stark factual distinction between *Hardin* and the present case. In *Hardin* there was one suicide; in this case there were two raids. Indeed, at oral argument, Sheriff Moran's counsel conceded that after the first raid, Sheriff Morgan was debriefed on how the raid had been conducted. Counsel further acknowledged that what happened at the second raid was materially identical to the events of the first raid. Thus, even if Sheriff Morgan had a reasonable basis for believing that his policies and training were adequate going into the first raid, that fails to explain why he authorized exactly the same conduct three months

> later in March of 1991, when he had reason to know better. Similarly, even if Chief Morgan and Officer Dendinger had not been fully aware of the Task Force's plan of attack before the first raid, as participants in the first raid they had ample opportunity to determine before the second raid was conducted whether the first had comported with constitutional requirements. Upon learning of the manner in which the first raid was conducted, reasonable law enforcement officials would have been on notice that clearly established Fourth Amendment rights had been violated. Willingness to engage in the second raid demonstrated deliberate indifference to those rights, and it reflected accession to and adoption of the policies and procedures employed.

5 F.3d 1448-1449. In *Swint v. City of Wadley*, 11 F.3d 1030 (11th Cir. 1994) (*Swint II*), the Court continued to hold that Sheriff Morgan is required to stand trial.

Under the law of the case doctrine, both the District Court and the Appellate Court are generally bound by a prior appellate decision of the same case. *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984). The doctrine promotes finality, assures the obedience of the District Court to appellate decisions, and avoids waste of judicial resources. The doctrine, is subject to exceptions and "does not apply to bar reconsideration of an issue when (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." *Wheeler*, 746 F.2d at 1440, *See also, e.g., United States v. Tamaro*, 80 F.3d 1514, 1520 (1996); *Litman v.*

Massachusetts Mutual Life Insurance Co., 825 F.2d 1506, 1510 (11th Cir. 1987); see also *North Mississippi Communications, Inc. v. Jones*, 951 F.2d 652, 656 (5th Cir. 1992). *See also*, 10A Wright & Miller, *Federal Practice and Procedure*, § 2735 ("The denial of a motion for summary judgment . . . should . . . establish the law of the case for a subsequent motion based precisely on the same grounds.")

Here, there was no "substantially different" evidence presented on remand. According to Sheriff Morgan's memorandum in support of his summary judgment motion on remand, this Court's earlier rejection of his position was "[b]ased on the record as it stood at the time of oral argument before the Eleventh Circuit." Pet. App. 6. In this new affidavit, Sheriff Morgan claimed he was told only about the results of the raid and not the specific details. Pet. App. 20.

Prior to that, the time the Court of Appeals found that Sheriff Morgan had reason to know about the raid, the only evidence before the Court was what the Sheriff *had been told* after the first raid. There was no evidence before the Court of Appeals as to what the Sheriff *had not been told*. Pet. App. 19.

The purportedly new information that Morgan claims he presented on remand, was something that should have been presented to the District Court and the Eleventh Circuit the first time around. The decision of the Eleventh Circuit demonstrated the danger of not applying the law of the case doctrine. Litigants like Sheriff Morgan will file summary judgment motions, lose them, perhaps take appeals, and then file new motions on the theory that

they forgot to include something the last time around. It was Morgan's fault that purportedly new information was not presented earlier. In essence the Court of Appeals has opened the door to litigants that would allow them to waste the Court's and the parties' time and resources. The purportedly new information that Morgan claims he presented on remand was something that should have been presented to the District Court and the Eleventh Circuit the first time around. The decision of the Eleventh Circuit demonstrated the danger of not applying the law of the case doctrine. The result in *Swint II* is contrary to the principle set out in *Montana v. United States*, 440 U.S. 147, 153 (1979). In Montana, the Court noted that the purpose of the law at the case doctrine is:

> "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."

440 U.S. at 605. By holding to the contrary based upon information and arguments that had already been presented, the Eleventh Circuit's decision affirming the District Court's ruling on remand violated the law of the case.

This Court has held in the past that it has the power to correct certain errors and to make modifications in the decree. *Arizona v. Califorina*, 460 U.S. 605, 619 (1983).

IV. THIS CASE RAISES IMPORTANT ISSUES OF FEDERAL LAW AND AFFECTS THE EFFICIENCY OF THE JUDICIAL PROCESS.

This is an important issue of federal law. A number of cases are brought against local governments under § 1983 in Alabama and elsewhere, for the actions of high officials, particularly in the area of law enforcement. The theory employed by the Eleventh Circuit is not necessarily limited to Alabama, but could be used in any state where certain officials, such as sheriffs, have absolute sway over particular areas, such as law enforcement, independent of other county officials. Indeed, under the Eleventh Circuit's theory, counties in most states would never be liable for constitutional violations committed in the arena of law enforcement. For these reasons, the decision below severely restricts the remedies available to citizens under § 1983. Also, enough complexity already exists in the interpretation of § 1983 without the added confusion and conflict created by the Eleventh Circuit's interpretation. Finally, the law of the case doctrine promotes the finality and efficiency of the judicial process and should be applied to *Swint II*.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Eleventh Circuit in this case.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6229

D. C. Docket No. CV91-V-965-E

TOM SWINT, TONY SPRADLEY,
DRECILLA JAMES, JEROME LEWIS,

Plaintiffs-Appellants,

versus

CHAMBERS COUNTY COMMISSION and
SHERIFF JAMES C. MORGAN,

Defendants-Appellees,

THE CITY OF WADLEY, ALABAMA, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Alabama

(Filed December 27, 1996)

Before KRAVITCH, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

The plaintiffs appeal the district court's grant of summary judgment on their due process claim in favor of defendant Chambers County Commission ("Chambers

County") and on their Fourth Amendment claims in favor of defendants Chambers County and Sheriff James C. Morgan ("Morgan"). We affirm.

I. FACTS AND PROCEDURAL POSTURE

This case comes back to us after we remanded it to the district court for further proceedings in *Swint v. City of Wadley, Alabama,* 51 F.3d 988 (11th Cir. 1995). The background facts and the procedural history of the first appeal are set out in that opinion. *See* 51 F.3d at 991-94. In that opinion, we declined to review the district court's denial of Chambers County's motion for summary judgment, because that denial did not meet the requirements of *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541, 546, 69 S. Ct. 1221, 1225 (1949), and because there is no pendant party appellate jurisdiction. *Swint,* 51 F.3d at 1002 (citing *Swint v. Chambers County Comm'n,* ___ U.S. ___, 115 S. Ct. 1203 (1995)).

We also affirmed the district court's denial of Morgan's motion for summary judgment on the plaintiffs' Fourth Amendment claim. We held that the district court properly denied Morgan's motion for summary judgment because the existence of an improper policy is sufficient to meet 42 U.S.C. § 1983 causation requirements, and Morgan's authorization of a second, identical raid at Club Capri with knowledge of how the first raid was conducted is evidence of an improper policy. *Id.* at 999-1000.

After we remanded the case to the district court for further proceedings, the plaintiffs reached a settlement agreement with several of the defendants. The following claims remained after the settlement agreement:

(1) a 42 U.S.C. § 1983 claim against both Morgan and Chambers County for violations of the plaintiffs' rights under the Fourth Amendment; and

(2) a 42 U.S.C. § 1983 claim against Chambers County for deprivation of due process.

The district court issued an order permitting Chambers County and Sheriff Morgan to file second motions for summary judgment. Chambers County argued that is not liable for Morgan's law enforcement activities, because sheriffs in Alabama are not final county policymakers in the area of law enforcement. The basis for Morgan's renewed motion for summary judgment was his affidavit, which he submitted as new evidence. In that affidavit, Morgan swore that he was never informed about the improper actions taken at the raids. The plaintiffs opposed Morgan's motion and argued that his affidavit provided no new evidence, because all of the information in the affidavit had been before the district court when it denied Morgan's first motion for summary judgment and was in the record when we decided the first appeal.

The district court granted both Chambers County's and Morgan's second motions for summary judgment. The district court held that Chambers County is not liable for Morgan's law enforcement activities, because sheriffs in Alabama are not final county policymakers in the area of law enforcement. The district court also held that the new information supplied by Morgan's affidavit was sufficient to eliminate all questions of material fact regarding the plaintiffs' Fourth Amendment claims against Morgan. We affirm.

II. DISCUSSION

We review a grant of summary judgment *de novo*. *See, e.g., Gibson v. Resolution Trust Corp.*, 51 F.3d 1016, 1020 (11th Cir. 1995); *Zipperer v. City of Fort Myers*, 41 F.3d 619, 622 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 52 (1995). Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Gibson*, 51 F.3d at 1020. All evidence is viewed in a light most favorable to the non-moving party and all inferences are drawn in the non-movant's favor. *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1383 (11th Cir. 1990).

A. Claims against Chambers County

The plaintiffs seek to hold Chambers County liable for constitutional violations that resulted from the raids of Club Capri. Under *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S. Ct. 2702 (1989), and similar cases, a county may be subject to § 1983 liability for an act or decision of a county official with final policymaking authority in the area of the act or decision. *See id.* at 737, 109 S. Ct. at 2724; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S. Ct. 1292, 1298-99 (1986). However, as plaintiffs concede, our recent decision in *McMillian v. Johnson*, 88 F.3d 1573 (11th Cir. 1996), forecloses their claim against the county in the present case. *McMillian* held that sheriffs in Alabama are not final county policymakers in the area of law enforcement. *Id.* at 1583. Because Morgan is an Alabama sheriff and because the raids of Club Capri were law enforcement activities,

Chambers County is not liable for any of Morgan's acts or decisions arising out of the raids. Therefore, Chambers County was properly awarded summary judgment.

B. Claims against Morgan

The district court also properly granted Morgan's motion for summary judgment. Morgan's affidavit provides evidence that the arrest procedures he authorized are not unconstitutional. In his affidavit, Morgan denies with particularity having had knowledge, prior to the second raid, of any of the first raid actions plaintiffs allege violated their constitutional rights. The plaintiffs have neither controverted that affidavit evidence nor have they pointed to inconsistencies in any of Morgan's statements, or to any other evidence, that would create a genuine issue of material fact about it.

Plaintiffs argue that our denial of Morgan's motion for summary judgment in the prior appeal is the law of the case. *See Lehrman v. Gulf Oral Corp.*, 500 F.2d 659, 622 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S. Ct. 1128 (1975). However, there are three recognized exceptions to the law of the case doctrine: (1) where new and substantially different evidence material to the issue has been presented after the appellate decision; (2) where controlling authority contrary to the law of the previous decision has been rendered since that decision; or (3) where the earlier ruling was clearly erroneous and would work a manifest injustice if implemented. *Flint Elec. Membership Corp. v. Whitworth*, 68 F.3d 1309, 1313 (11th Cir. 1995) (citing *United States v. White*, 846 F.2d 678, 685 (11th Cir.),

cert. denied, 488 U.S. 984, 109 S. Ct. 537 (1988)). Sheriff Morgan relies primarily on the first exception.

The plaintiffs respond that that exception is inapplicable here, because the affidavit accompanying Morgan's motion for summary judgment did not provide new, much less "substntially different, information. They contend that Morgan specifically argued in the first appeal that he did not know of those specifics of the first raid that made it unconstitutional, which is the same "new" evidence his affidavit purports to provide. However, we have examined the record carefully, and we find that, whatever Morgan may have argued, at the time of our prior decision there was no evidence precluding a factual issue about whether Morgan knew how the first raid was conducted. Although Morgan contended in the prior appeal that it was undisputed that he did not know the details of the first raid, his deposition was the sole basis for that contention. In his deposition, Morgan testified that he received information that arrests were made and illegal alcohol seized during the first raid. But Morgan was not asked during the deposition, and he did not reveal, whether that was all that he was told about the raid. During his deposition, he was silent about whether he knew at the time of the second raid how the first raid had been conducted. Thus, denial of Morgan's first motion for summary judgment was appropriate. Morgan's affidavit is new and substantially different evidence that brings the district court's judgment within the first exception to the law of the case doctrine.

Because the record, which includes the affidavit, contains uncontroverted evidence that Sheriff Morgan had no knowledge of the alleged constitutional violations

prior to authorizing the second raid, the district court properly granted Morgan's motion for summary judgment notwithstanding our prior decision in this case.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's grant of summary judgment in favor of defendants Chambers County and Morgan.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

TOM SWINT; ET AL, Plaintiffs, VS. THE CITY OF WADLEY, ALABAMA; ET AL, Defendants.	))))))))	CIVIL ACTION NO. 91V-965-E

ORDER AND JUDGMENT

(Filed Jan. 29, 1996)

In accordance with the Memorandum Opinion entered in the above-styled cause on this date, it is ORDERED, ADJUDGED and DECREED by this Court:

1. That the Second Motions for Summary Judgment filed herein December 1, 1995, by Defendant James C. Morgan and the Chambers County Commission be, and the same are hereby, GRANTED.

2. That Plaintiffs take nothing by their Complaint herein against said Defendants Morgan and Chambers County Commission.

3. That the above-styled cause be, and the same is hereby, DISMISSED with prejudice with costs taxed against Plaintiffs, for which execution may issue.

DONE this 29th day of January, 1996.

/s/ R. E. Varner
R. E. VARNER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

TOM SWINT, et al.	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION**
THE CITY OF WADLEY, ALABAMA, et al.	)	**NO. 91-V-965-E**
Defendant.	)	

MEMORANDUM OPINION

INTRODUCTION

(Filed Jan. 29, 1996)

This cause is before the Court on motions for summary judgment filed pursuant to Rule 56 of the Federal Rules of Civil Procedure on December 1, 1995 by defendants James C. Morgan and Chambers County.

This lawsuit stemmed from two law enforcement raids on the Capri Club, a nightclub located in Chambers County, Alabama. The Club is located within the police jurisdiction of the city of Wadley which is in Randolph, County, Alabama. Plaintiffs Tom Swint and Tony Spradley are owners of the Club; plaintiff Drecilla James is a Club employee who was present during both of the raids; Jerome Lewis is a Club patron who was present during the second raid.

The defendants in the suit originally were the City of Wadley, Police Chief Freddie Morgan (individually and in

his official capacity); Officer Gregory Dendinger (individually and in his official capacity); Chambers County Commission; Chambers County Sheriffs Department; and Chambers County Sheriff James C. Morgan (individually and in his official capacity).

The Plaintiffs filed this suit in August of 1991. Defendants City of Wadley, Freddie Morgan, and Gregory Dendinger filed motions for summary judgment in January of 1992. Defendants Chambers County and James C. Morgan filed motions for summary judgment in February of 1992. This Court entered an order on June 2, 1992 granting summary judgment in part, and denying it in part. The Defendants appealed.

On November 3, 1993, the Eleventh Circuit Court of Appeals affirmed this Court's holdings in part, and reversed and remanded in part. *Swint v. City of Wadley, Alabama,* 5 F.3d 1435 (11th Cir. 1993), *modified,* 11 F.3d 1030 (1994). Jurisdiction for Chambers County's appeal was premised upon pendant party appellate jurisdiction. The United States Supreme Court ordered the Eleventh Circuit Court of Appeals to vacate that part of its opinion due to the Supreme Court's determination that there is no pendant party appellate jurisdiction. *Swint v. Chambers County Comm'n,* ___ U.S. ___, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). Accordingly, the Court of Appeals issued a revised opinion on May 9, 1995. *Swint v. City of Wadley,* 51 F.3d 988 (11th Cir.1995).

Following settlements by the City of Wadley, Freddie Morgan, and Gregory Dendinger,[1] the remaining claims are as follows:

1) Against Chambers County: Fourth Amendment Claim and Due Process Claim.

2) Against James C. Morgan: Fourth Amendment Claim.

On November 1, 1995, this Court filed an order allowing the remaining parties to file second motions for summary judgment. On December 1, 1995, both defendants filed such motions. The Plaintiffs' motions in opposition were filed on January 5, 1996. After fully considering both parties' positions, this Court is of the opinion that both defendant Chambers County's and defendant James C. Morgan's motions for summary judgment are due to be GRANTED.

FACTUAL BACKGROUND

On December 14, 1990, an undercover officer entered into the Capri Club. While inside, the officer was offered marijuana and crack cocaine for sale by a patron of the club who is not a party hereto. After purchasing the drugs, the officer left the Club and signaled for the raid to begin. Plaintiffs allege that this Task Force, consisting of about 30-40 officers dressed in black and wearing ski masks, pointed their weapons at plaintiffs Spradley and James and others who were present. Plaintiffs also allege

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[1] As of October 31, 1995, this Court was advised that all Defendants have settled, except for Chambers County and Sheriff James C. Morgan.

that participants in the raid searched the Club's cash register and door receipts, and some currency was confiscated from the door receipts. Plaintiffs further allege that persons inside the Club were prohibited from moving or leaving until the raid, which lasted one to one and one-half hours, was over.

Only two people were arrested from this first raid: the man who sold the undercover officer drugs; and the man's younger brother, a minor, who was in possession of several marked bills used by the officer to pay for the drugs.[2]

On March 29, 1991, there was a second raid conducted at the Club. This raid was conducted in a very similar manner to the first. Again the undercover agent purchased drugs, then signaled for the raid to begin. During the raid, plaintiffs allege that law enforcement officials chambered rounds of ammunition in their weapons, pointed them, and ordered persons in the club to get down on the floor. Plaintiffs also allege that during this search several people, including plaintiff Lewis, were searched. Lewis further alleges that he was pushed outside the Club, grabbed, shoved against a wall, and had an officer point a shotgun in his face while the officer's finger was on the trigger.

Sheriff Morgan was not physically present during either raid, but he authorized both of them.

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[2] Neither arrestee is a party to this suit.

CHAMBERS COUNTY

Section 1983 liability may not be grounded in a theory of respondeat superior. *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). A city or county government may, however, be subjected to § 1983 liability for the acts of an official who possesses "final authority to establish municipal [or county] policy with respect to the action ordered." *Pembaur v. Cincinnati*, 475 U.S. 469, 481 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986).

It is clear that a city or county may be held liable under § 1983 "only when the deprivation at issue was undertaken pursuant to [municipal or county] 'custom' or 'policy.' " *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1479 (11th Cir. 1991). Policy or custom need not be legislatively enacted; rather, an "official who has 'final policymaking authority' in a certain area of the [county's] business may by his or her action subject the [county] to § 1983 liability when the challenged action falls within that authority." *Id.* at 1480 (citations omitted). "Whether a particular official has final policymaking authority is a question of state law." *Brown*, 923 F.2d at 1480 (citations omitted).

In order to determine whether Chambers County is liable for the actions of the Sheriff, this court must first determine whether Sheriff Morgan was exercising county power with final authority when he authorized the law enforcement raids in this case. In response to the Defendants' first motion for summary judgment, this Court held that the Sheriff may be the final decision-maker for the county in ferreting out crime. *Swint v. City of Wadley*,

CA No. 91-V-965-E (M.D. Ala 1992) at page 26. The Defendants immediately appealed, however, and the Court of Appeals agreed to hear the County's contentions under the doctrine of pendant party appellate jurisdiction. After hearing the County's contentions, the Court of Appeals found that the Sheriff **was not** the final decision-maker. The Plaintiffs then appealed to the United States Supreme Court who vacated that part of the opinion on jurisdictional grounds, holding that the appeal should not have been heard because there is no pendant party appellate jurisdiction. *Swint v. Chambers County Comm'n*, ___ U.S. ___, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). The case was then remanded to this court without instructions as to the County's liability. Though no longer binding law, the rationale employed by the Court of Appeals in its original *Swint* Opinion, regarding the County's liability, impresses this Court and this Court now finds that the Sheriff was **not** the final decision-maker. The Supreme Court reversed the Court of Appeals only as to pendant party appellate jurisdiction. This in no way impugns the integrity of the substance of the Court of Appeals' opinion; therefore, this Court may look to the former decision for guidance.

In the original *Swint* Opinion, the Court of Appeals noted that "Alabama counties 'are authorized to do only those things permitted or directed by the legislature of Alabama,' . . . and because the State has not assigned the counties any law enforcement authority, the sheriff is not exercising county power when he authorizes a raid on suspected criminal activity within his county." *Swint*, 5 F.3d at ___ (citing *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984)).

Accordingly, this Court agrees that a sheriff is not the final repository of the county's general law enforcement authority, because Alabama law has not conferred general law enforcement authority upon counties. Law enforcement duties have been bestowed upon sheriffs and their deputies, not the counties.[3]

This Court is further impressed by the numerous district courts which have relied on, or held similarly to, the original *Swint* opinion, before and after the Supreme Court's decision to vacate on jurisdictional grounds. In fact, Defendants cited eight District Court cases in Alabama holding that sheriffs do not exercise policymaking authority for counties with respect to law enforcement, since the county has no law enforcement authority. *See Hope v. City of Hueytown*, No. CV-92-N-0126-S, slip opinion at 20-23 (N.D. Ala. Oct. 14, 1992) (Nelson, J.), *aff'd*, 56 F.3d 1389 (11th Cir. 1995) (affirmed without opinion); *Forehand v. Roberts*, 1992 W.L. 554241 (M.D. Ala. Aug. 11, 1992) (Albritton, J.); *Smith v. Arndt*, 1992 W.L. 547727

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[3] Similarly, the Court of Appeals noted that respondeat superior is not available for the § 1985(3) conspiracy claim. *Owens v. Haas*, 601 F.2d 1242, 1247 (2d Cir.), *cert. denied*, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979). In a § 1985 claim, just as in a § 1983 claim, a plaintiff must allege and prove each defendant's participation in the conspiracy, or a policy or custom of a municipal defendant that is causally related to the conspiracy.

No facts were alleged that the County Commission was involved in the conspiracy; therefore, there is no direct participation by the County. Additionally, because the Sheriff is not the final law enforcement decisionmaker for the county, the county cannot be held liable under § 1985(3) for the alleged actions of the Sheriff.

(N.D. Ala. July 14, 1992) (Hancock, J.); *Sanders v. Miller*, 837 F.Supp. 1106, 1109-10 (M.D. Ala. 1992); *Cofield v. Randolph County Comm'n*, 844 F.Supp. 1499, 1501-02 (M.D. Ala. 1994); *McMillian v. Johnson*, No. CV-93-A-699-N, slip opinion at 28-35 (M.D. Ala. Aug. 9, 1995) (Albritton, J.); *Warren v Coffee County*, No. 95-T-242-S, slip opinion at 13 (M.D. Ala. Aug. 9, 1995) (Thompson, J.); *Wilson v. Lowndes County, Ala.*, No. 95-T-668-N, slip opinion at 1 (M.D. Ala. Aug. 28, 1995) (Thompson, J.). As the Court of Appeals has not reversed those decisions, the Court views them as persuasive.

Accordingly, summary judgment is due to be GRANTED in favor of Chambers County because the sheriff is not the final law enforcement decision-maker for the county.[4]

SHERIFF JAMES C. MORGAN

It is well settled that government officials performing discretionary functions are entitled to immunity from civil liability for damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Although this qualified immunity is often referred to as "good faith" immunity, the test is actually one of

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[4] As this Court has held that the County is not liable for law enforcement decisions of the county, it is unnecessary to determine whether the Plaintiffs have stated a valid substantive due process claim.

objective legal reasonableness, without regard to the actor's subjective good faith. *Courson v. McMillian,* 939 F.2d 1479 (11th Cir. 1991). In order to determine whether the government official has acted with objective legal reasonableness, this Court must perform a two part analysis. The Defendant must first prove that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred," and "then the burden shifts to the plaintiff to demonstrate that the defendant violated clearly established constitutional law." *Sammons v. Taylor,* 967 F.2d 1533, 1539 (11th Cir. 1992) (quotations omitted).

The Plaintiffs do not dispute that the Sheriff was acting within his discretionary authority. The Plaintiffs do, however, contend that he acted in violation of "clearly established" law.

This Court held, and the Court of Appeals agreed, that it was "clearly established . . . that a raid of a business establishment violates the Fourth Amendment unless based on probable cause and exigent circumstances . . . " *Swint,* 51 F.3d at 995. This Court further held, and the Court of Appeals agreed, that "the arrest of one person who had sold drugs to the undercover officer did not entitle the officers to search the entire premises in which he was located" and "[n]o reasonable law enforcement officer in the circumstances presented here could have believed that probable cause existed to search the entire Club and seize all of its occupants." *Id.* 51 F.3d at 998.[5] Sheriff Morgan, however, did not personally

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[5] Defendants also contended that the raids were administrative inspections of private commercial property, and,

participate in either raid; therefore, this Court must inquire further to determine whether his actions (adoption of a policy or failure to adopt a policy) violated clearly established law.

As discussed earlier, Section 1983 liability may not be grounded in a theory of respondeat superior. *Monell*, 436 U.S. at 694. Accordingly, § 1983 liability requires proof of an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation. *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986). "[I]t is clear that the inquiry into causation must be a directed one, focusing on the duties and responsibilities of each of the individual defendants whose acts or omissions are alleged to have resulted in a constitutional deprivation." *Williams v. Bennett*, 689 F.2d 1370, 1381 (11th Cir. 1982), *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983) (interpreting *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). The requirement for an affirmative causal connection may be met by showing an improper policy or the absence of a policy. *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991). Sheriff Morgan will only be liable, however, if "a policy or custom that he has established or utilized results in deliberate indifference to [the Plaintiffs'] constitutional rights." *Zatler*, 802 F.2d at 402.[6] Hence, if Sheriff Morgan had a

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as such, were not violative of the Fourth Amendment. This argument has also been rejected by this Court and the Court of Appeals. *Swint*, 51 F.3d at 998-999.

[6] The standard for the failure to adopt an adequate policy is essentially the same. "[A]ny alleged failure to adopt adequate policies . . . must amount to a breach of [the Defendant's] duty and must evidence reckless disregard or deliberate indifference to [the Plaintiff's] constitutional rights." *Zatler*, 803 F.2d at 402.

reasonable[7] basis for believing that his policies and training were adequate, then he is entitled to qualified immunity and summary judgment. *See Swint*, 51 F.3d at 999.

This Court denied Sheriff Morgan's original motion for summary judgment due to this Court's belief that, based on the facts known to the Court **at that time**, there was a genuine issue of material fact "as to whether the raids were causally connected to Sheriff Morgan's approval of the two raids and to his policy encouraging these raids." *Swint v. City of Wadley*, CA No. 91-V-965-E (M.D. Ala. 1992). The Court of Appeals recognized two reasons to deny the Sheriff's original summary judgment motion; (1) the Court of Appeals upheld this Court's denial of summary judgment which was based on certain statements which **could** (but did not necessarily) evidence an improper policy; and (2) the Court of Appeals added that "even if Sheriff Morgan had a reasonable basis for believing that his policies and training were adequate going into the first raid, that fails to explain why he authorized exactly the same conduct three months later in March of 1991, when he had reason to know better." *Swint*, 51 F.3d at 999.

Subsequent to this Court's original opinion, and the several Court of Appeals' opinions, new evidence has been presented as to what the Sheriff's policy was, and what the Sheriff knew following the first raid.

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[7] Using the test of objective legal reasonableness. *Courson v. McMillian, supra.*

1. Sheriff Morgan's Policy Originally

In denying the Sheriff's first motion for summary judgment, this Court expressed a concern over certain statements made by Sheriff Morgan and Officer Birchfield. Officer Birchfield swore in a 1992 affidavit that it was Sheriff Morgan's policy not to initiate a narcotics raid on a business establishment or a home unless there was either a search warrant **or a drug buy** (County's Ex. A, Birchfield Affidavit, ¶ 26). Similarly, Sheriff Morgan swore in a 1992 affidavit that "[i]t is common practice that if a drug buy takes place, **a drug raid may take place** to arrest those responsible" (County's Ex. D, Morgan Affidavit, ¶ 4). **Without further elaboration**, this Court was concerned that these statements could evidence a policy which encouraged overly broad searches (or raids) such as the one alleged in this case.

In connection with his Second Motion for Summary Judgment, Sheriff Morgan filed a Supplemental Affidavit. In this affidavit, Sheriff Morgan elaborated on what his policies were, or more importantly, what they were not.

> [A]n arrest based on probable cause could be made when a confidential informant was able to identify the person from whom he had bought illegal narcotics. **That person** could be searched incident to a probable cause arrest. **It was not my policy** that non-suspects could be searched, **no was it my policy** that business premises could be searched unless probable cause and exigent circumstances justified such a search.

(Supp'l Affidavit of James C. Morgan ¶ 12) (emphasis added).

Sheriff Morgan further elaborated that he never authorized (nor is he aware of) anyone being searched or detained, except those identified by the informant or undercover officer (Supp'l Affidavit of James C. Morgan ¶ 18).

Plaintiffs argue that Sheriff Morgan's affidavit provides no new evidence to the Court. However, due to this Court's concern about the policy of the Sheriff, as expressed in its original denial of summary judgment, this Court considers Sheriff Morgan's clarification to be extremely pertinent.

When a party makes a motion for summary judgment and provides supporting affidavits or testimony, the adverse parties' response must set forth specific facts showing there is a genuine issue for trial. FED. R. CIV. P. 56(e). The Plaintiffs essentially posited two responses to the Sheriff's Second Motion for Summary Judgment. First, Plaintiffs contend that nothing new has been presented since this Court and the court of Appeals ruled on this issue. As mentioned above, this Court believes that Sheriff Morgan's affidavit **does** provide new information (which has not been refuted by the Plaintiffs) which addresses the specific concerns expressed by this Court in its earlier denial of summary judgment.

Second, Plaintiffs contend that other testimony in Sheriff Morgan's deposition evidences a genuine issue of material fact. Plaintiffs cite Morgan's testimony in his deposition as indicating a policy to "control the crowd" in an establishment when someone in the establishment is being arrested for selling drugs. Morgan testified that:

> [I]f you were going to a drug operation at any business where you had a goodly number of people who were drinking alcohol, possibly using drugs, since you're doing a drug operation, then you certainly want to get somebody in that can take charge of the crowd.

(Morgan Dep. at 19).

Plaintiffs contend that this testimony evidences a policy which allows for unconstitutional raids, thus provides a genuine issue of material fact as to whether the Sheriff had improper policies. Plaintiffs suggest that the Sheriff's policy should be to "wait and arrest the person who sold the drugs when that person leaves the club" (Pls.' Mem. in Opp. to Second Motion for Sum. Judgment at P. 8). Obviously, such a policy is not practical. This would allow innumerable opportunities for the dealer to hide or sell the remaining evidence. It also provides the dealer sufficient time to learn of the awaiting officers and attempt to evade them. Moreover, in *Swint*, 51 F.3d at 997, the Court of Appeals, referring to the facts of this case, stated that where immediately before a raid, an undercover officer completed a drug buy, there is no question that probable cause exists to arrest and search the "narcotics peddler." The Court then described the entry of the SWAT team and other members of the task force who sought to identify, arrest and remove the drug seller from the Capri Club. *Swint*, F.3d at 997. Having described this scenario, the Court of Appeals then stated,

> If that had been the extent of the intrusion on these two occasions, this would be a different case. But that was not the end of the intrusion. On the contrary, the officers proceeded to detain at gunpoint dozens of citizens for an hour and a

> half, search a number of them, and search the premises as well.

Swint, 51 F.3d at 997.

The Court of Appeals clearly would not require officers to wait outside an establishment for a drug dealer to voluntarily leave, hoping the dealer would be kind enough to bring along all evidence of the earlier transactions.

Sheriff Morgan's Supplemental Affidavit presented evidence that his policies were fully in line with the constitutional standards. The Plaintiffs have not presented any testimony, or any other evidence, to contradict Sheriff Morgan's sworn statement as to his policy. Accordingly, Sheriff Morgan has presented sufficient, additional evidence to change the opinion of this Court as to its original grounds for denying summary judgment. This Court finds that there is no evidence that it was Sheriff Morgan's policy to search or detain non-suspects, nor that it was his policy to search an entire business premises unless probable cause and exigent circumstances justified such a search. Furthermore, no evidence has been presented which would indicate that Sheriff Morgan had any reason to doubt that his policies and training were adequate (at least going into the first raid).

2. Sheriff Morgan's Policy After The First Raid

In affirming this Court's original denial of summary judgment, the Court of Appeals added a second reason this court could have denied that motion. The Court of Appeals stated that "even if Sheriff Morgan had a reasonable basis for believing that his policies and training were

adequate going into the first raid, that fails to explain why he authorized exactly the same conduct three months later in March of 1991, when he had reason to know better." *Swint*, 51 F.3d at 999.

Again, the standard for determining the Sheriff's liability is whether there is an affirmative causal connection between the Sheriff's alleged acts or omissions and the alleged constitutional deprivation. The requirement for an affirmative causal connection may be met by showing an improper policy or the absence of a policy. *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991). The Sheriff's act (adoption of improper policy) or omission (failure to adopt adequate policy) must amount to reckless disregard or deliberate indifference to Plaintiffs' constitutional rights, *Zatler v. Wainwright*, 802 F.2d 397, 401-402 (11th Cir. 1986), and the policy (or lack of policy) must be causally related to the alleged deprivation.

At the time the Court of Appeals found that Sheriff Morgan had reason to know about the raid, the only evidence before the Court was what the Sheriff **had been told** after the first raid. There was no evidence before the Court of Appeals as to what the Sheriff **had not been told.**

In his supplemental affidavit, Sheriff Morgan testified that he was never informed about the alleged improper actions taken at the raids (Supp'l Affidavit of James C. Morgan ¶ 18). Plaintiffs have pointed to no inconsistencies in Sheriff Morgan's statements, nor have Plaintiffs presented any evidence to contradict these statements. Additionally, the Plaintiffs have not presented any evidence that anyone told, or could have told,

the Sheriff about the alleged improper actions at the raid. Accordingly, this Court must accept the statements of Sheriff Morgan as fact.

Plaintiffs' only response to Sheriff Morgan's supplemental affidavit, other than contending it offered nothing new, was to assert that a jury could "conclude he is being inaccurate" (Pls.' Mem. in Opp. to Second Motion for Sum. Judgment at P. 9).[8] The Plaintiffs are attempting to create a factual issue as to Sheriff Morgan's credibility. Plaintiffs have failed, however, to present any evidence calling Sheriff Morgan's credibility into question. "[T]he party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and . . . the opposing party may not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof." *Curl v. Int'l Business Machines Corp.*, 517 F.2d 212, 213 (5th Cir. 1975) (quoting *Rinieri v. Scanlon*, 254 F.Supp. 469, 474 (S.D.N.Y. 1966)).

The Sheriff, absent evidence to the contrary, had a right to rely upon his officers' representations about the first raid in authorizing the second raid. *See United States v. Ventresca*, 380 U.S. 102, 111, 85 S.Ct. 741, 747 (1965) (upholding warrant based upon representations of other officers); *United States v. Kirk*, 781 F.2d 1498, 1505 (11th

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[8] Plaintiffs also contended that a genuine issue existed due to the Sheriff's deposition testimony about "controlling the crowd." This contention, however, was previously covered and rejected. *See, supra* pp. 13-14.

Cir. 1986) (allowing warrant to be based upon the observations of fellow officers). Sheriff Morgan's uncontradicted testimony shows that he was not informed of any improper actions occurring at the first raid (Supp'l Affidavit of James C. Morgan ¶ 18); therefore, it was reasonable for him to rely upon his officers' representations to him when authorizing the second raid.

Without refuting Sheriff Morgan's testimony about his policies or his knowledge of the alleged events at the first raid, Plaintiffs have failed to point to any facts which could show that Sheriff Morgan's policies, or his failure to adopt new policies after the first raid, amounted to deliberate indifference to the Plaintiffs' constitutional rights.

This Court is also impressed that the Plaintiffs have only alleged one other incident in which their constitutional rights were infringed (the first raid). It could hardly be said that one incident constitutes a "policy" or "custom." Practically an identical contention was made by the plaintiffs in *McLaughlin v. City of LaGrange*, 662 F.2d 1385 (11th Cir. 1981). In *McLaughlin*, one of the plaintiffs was beaten by a certain officer in 1979. The Plaintiff complained to one of the defendants (the Chief of Police) and, apparently, no action was taken. In 1980, several inmates (including the one previously beaten) were severely beaten by the same officer. The plaintiffs attempted to justify liability of the Chief by asserting a "custom" or "policy" as evidenced by his lack of action after the first incident. The Court of Appeals, affirming the District Court's grant of summary judgment for the

Chief, held that "[t]his isolated incident does not establish either 'custom' on the City's part or culpable nonfeasance sufficient to constitute 'malicious intent' on Chief Shepherd's part." *McLaughlin*, 662 F.2d at 1388. Similarly, the isolated incident of the first raid, without more, does not establish a "policy" or "custom" sufficient to warrant liability for Sheriff Morgan.

CONCLUSION

For the reasons stated above, this Court finds that both Defendant James C. Morgan's motion for summary judgment and Defendant Chambers County's motion for summary judgment are due to be GRANTED. A separate order and judgment will be entered in accordance with this memorandum opinion.

DONE this 29th day of January, 1996.

/s/ R. E. Varner
ROBERT E. VARNER
UNITED STATES DISTRICT
JUDGE